

**The British Peerage:
The Legal Standing of the Peerage and Baronetage
in the overseas realms of the Crown with
particular reference to New Zealand**

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I. INTRODUCTION

In 1976, an article published in the *New Zealand Law Journal* argued that hereditary titles had no legal status in New Zealand.¹ This conclusion was based on the reasoning that New Zealand was a separate sovereignty from that of the United Kingdom.² Peerages created in one sovereignty were not, unlike knighthoods,³ recognised in another.⁴ Therefore, it was argued, the peerages of England, Scotland, Ireland, Great Britain, and the UK⁵ had no legal status in New Zealand.

It is my intention to disprove this thesis. I contend that peers and baronets of the United Kingdom can have legal status abroad and indeed do have this status in all those countries of which Her Majesty is Queen. The recent ennoblement of Sir Robin Cooke, lately President of the Court of Appeal of New Zealand, adds contemporary relevance to the examination of this question.⁶

¹ Stevens, "Sir Basil? Or Mr Arthur?" [1976] NZLJ 30.

² *R v Secretary of State Foreign and Commonwealth Office, ex p Indian Association of Alberta* [1982] QB 892; *A-G for the UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129.

³ A man was to be named as knight wheresoever he received the dignity: *Calvin's Case* (1607) 7 Co Rep 156 16a; 77 ER 377, 396. The practical effect of this case, and arguably the legal effect, has since been undermined. Foreign knights have not been entitled to any style, appellation, rank, precedence, or privilege appertaining to knights bachelors since 1823. From the end of the eighteenth century the recognition of knighthood bestowed by foreign rulers declined. However, it was approved in *Lord Advocate v Walker Trustees* [1912] AC 95: "Knighthood is a personal dignity conferred for life, not of any particular kingdom, like peerage or baronetcy, but recognised in every part of the Queen's dominions".

⁴ *Calvin's Case*, *supra* n 3, 396 relying upon *Richmond's (Earl of) Case* (1338) 11 Edw III Fitz Brief 473; 9 Co 117b: "An earl of another nation or kingdom is no earl (to be named in legal proceedings) within this realm". See also *Lord Advocate v Walker Trustees*, *supra* n 3.

⁵ Since the Union with Scotland Act 1706 (5 Ann c 8) (Eng) and the Union with Ireland Act 1800 (GB) (39 & 40 Geo III c 67) new peerages have been of the UK, and not of England, Scotland or Great Britain. Both Acts are silent as to the status of baronets.

⁶ There are at present four other peers living in New Zealand- Viscount Bolingbroke and St John, and Lords Citrine, de Villiers and Lyveden. The Earl of Mount Edgcumbe and

II. THE NATURE OF PEERAGE

Before asking whether a peer has legal status in New Zealand, it is necessary first to define what is meant by this legal status.

English law recognises a peerage as an incorporeal and imitable hereditament, inalienable and descendable according to the words of limitation in the grant, if any.⁷ As a descendable dignity, it was covered by the Statute of Westminster the Second 1285 (Eng) (De Donis Conditionalibus).⁸ A peerage is descendable as an estate in fee tail, rather than as a fee simple conditional,⁹ whether it is conferred with any territorial qualification or not.¹⁰ The naming of a place is not essential to the creation of a peerage.¹¹ A peerage does not have any connection with the tenure of land,¹² but it is customary for viscounts and barons at least to have a territorial designation¹³ ("Baron [xxx] of [xxx] in Our County of [xxx]").¹⁴

The estate in fee tail, also called an estate tail, is limited to a person and the heirs of his body, or to a person and the particular heirs of his body. Each successive heir to a

Lord Grey of Naunton are both New Zealanders, now living in the UK. In addition, there are some 15 baronets living in New Zealand.

⁷*Nevil's Case* (1604) 7 Co Rep 33a; 77 ER 460; *R v Purbeck (Viscount)* (1678) Show Parl Cas 1, 5; 1 ER 1; *Norfolk Earldom Case* [1907] AC 10; *Rhondda's (Viscountess) Claim* [1922] 2 AC 339. If the peerage is a barony by writ, there will, of course, be no words of limitation. In English law, letters patent purporting to create a peerage without including words of limitation will be held to be bad. In Scotland a grant in fee would be presumed- *Perth Earldom Case* (1848) 2 HL Cas 865; 9 ER 1322; *Herries Peerage Case* (1858) LR 2 Sc & Div 258; *Mar Peerage Case* (1875) 1 App Cas 1, 24, 36. This presumption is, however, rebuttable- *Herries Peerage Case*, *ibid*; *Mar Peerage Case*, *ibid*.

⁸13 Edw I c 1.

⁹*Re Rivett-Carnac's Will* (1885) 30 ChD 136.

¹⁰*Ferrers' (Earl) Case* (1760) 2 Eden 373; 28 ER 942.

¹¹*R v Knollys* (1694) 1 Ld Raym 10; 91 ER 904; *Re Rivett-Carnac's Will*, *supra* n 9, 136; indeed, with a peerage created by writ of summons this would not be possible.

¹²This was not always so, however. From the time of Henry VI until 1861 it was believed that peerages by tenure were possible. (*Arundel Case* (1433) 4 Rot Parl 441; *Berkeley Peerage Case* (1861) 8 HLC 21; 11 ER 333).

¹³Thus, although peers created for services to New Zealand usually include New Zealand places in their title, this is not strictly necessary, nor must a location in the UK also be included. For example, Lord Rutherford was Baron Rutherford, of Nelson, New Zealand, and of Cambridge, Cambridgeshire. There is an unfortunate tendency for writers to confuse place-names which form part of the peerage title, and those which are merely territorial limitations. For example, Lord Rutherford should never be called Lord Rutherford of Nelson.

¹⁴See the Crown Office (Forms and Proclamations Rules) Order 1992, SI 1992/1730, art 2, Schedule, Part III, Forms D-G.

peerage succeeds to the peerage in the terms of the original grant.¹⁵ A limitation to "his heirs" will not carry the peerage to collateral heirs¹⁶ though a grant to the grantee and his heirs male will.¹⁷ A peerage cannot be created with a limitation of descent which is unknown to the law of real property.¹⁸ A subject refuse a peerage, even if it is conferred in infancy.¹⁹

A peerage cannot be the subject of a trust, nor pass to a trustee in bankruptcy.²⁰ A peer, once created by the Crown in the exercise of the royal prerogative, is ennobled in blood²¹ so that no one can be deprived of a peerage except by or under the authority of an act of Parliament.²² Nor, once conferred, may a peerage be renounced, although an heir, upon succeeding to a peerage, may now renounce the dignity for his lifetime, under the Peerage Act 1963 (UK).²³

¹⁵ A declaration of legitimacy obtained pursuant to the provisions of the Legitimacy Declaration Act 1858 (21 & 22 Vict c 93) (UK) is good for peerages and other dignities: *Ampthill Peerage Case* [1977] AC 547. While the laws governing legitimacy have become more liberal since last century, they do not in general allow the inheritance of dignities by illegitimate issue.

¹⁶ *Wiltes Peerage Case* (1869) LR 4 HL 26, not following *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 ER 293.

¹⁷ But not to his heirs general, as would a grant of land to the grantee and his heirs male- *Wiltes Peerage Case*, *supra* n 16.

¹⁸ *Wiltes Peerage Case*, *supra* n 16; *Cope v De La Warr (Earl)* (1873) 8 Ch App 982; *Buckhurst Peerage Case* (1876) 2 App Cas 1, 20, per Lord Cairns, LC.

¹⁹ *Egerton v Brownlow (Earl of)* (1853) 4 HL 1 Cas 1; 10 ER 359; *Mortimer Sackville's Case* (1719) cited in *Buckhurst Peerage Case* (1876) 2 App Cas 1, 6n; *Queensberry's (Duke of) Case* (1719) 1 P Wms 582; 24 ER 527.

²⁰ *Buckhurst Peerage Case* (1876) 2 App Cas 1, *Re Earl of Aylesford's Settled Estates* (1886) 32 ChD 162.

²¹ *Report as to the Dignity of a Peer of the Realm* (1820, 1829 Reprint) vol I 393.

²² *Shrewsbury's (Countess of) Case* (1612) 12 Co Rep 106; 77 ER 1369; *R v Purbeck*, *supra* n 7, 5. Nor, could a peer loose his title by attainder for treason or felony- *Ferrers' (Earl) Case* (1760) 2 Eden 373; 28 ER 942. Attainder, or corruption of blood, was in any case abolished by s 1 Forfeiture Act 1870 (33 & 34 Vict c 23) (UK).

²³ Although no one could be deprived of a peerage without act of Parliament, it was once not unknown for peerages to be surrendered to the Crown, though it is now held that they may not be alienated. Until 1660 there were many instances where surrenders were made, the last being by the Earl of Buckingham, son of Viscountess Purbeck. It was held in the *Purbeck Case* of 1678 that a titular dignity could be surrendered, though not a feudal dignity. A peerage was held to be a feudal dignity rather than a titular dignity, and therefore unalienable. However, s 1 Peerage Act 1963 (UK) now allows a peerage to be voluntarily surrendered in certain circumstances. It is necessary to make such a disclaimer, intended to enable the heirs to hereditary peerages to stand for, and be elected to, the House of Commons, within twelve months from succession or their coming of age, or within one month if the heir is a member of the House of Commons. It does not affect the courtesy titles of children, nor the future succession of the title. Peers of first creation cannot disclaim their titles, and a peer who has disclaimed his title cannot subsequently receive an hereditary title, though he can a life peerage. Upon disclaimer, a

Since the passage of the Property Law Act 1952 in New Zealand, estates in tail in land have been deemed to be estates in fee simple.²⁴ This could have had the effect of altering the rules of descent for dignities in New Zealand, as peerages and baronetcies have been regarded as being an interest in land for the purposes of the Settled Land Act 1925 (UK).²⁵ However, the consequences of this act cannot be ascertained by the common law courts, as questions of dignity or honour cannot be tried by an ordinary court of law.²⁶

A hereditary peerage can be created either by the issue of a writ of summons to the House of Lords, followed by the taking of his seat by the recipient of the writ,²⁷ or by letters patent, the latter method having been invariably adopted since very early times.²⁸

peer (and his wife) is divested of all his rights and interests to and in the peerage, and all titles, rights, offices, privileges and precedence attaching to it. It does not however affect any rights limited or settled to devolve with the peerage, such as land- ss 3 (1), 3 (1) (a), 3 (2), 3 (3) Peerage Act 1963 (UK). Life peerages may not be disclaimed.

²⁴Property Law Act 1952, s 16.

²⁵15 & 16 Geo V c 18 s 67, replacing the Settled Land Act 1882 (45 & 46 Vict c 38) s 37 (UK). Land includes manor, advowson, rent, and other incorporeal hereditaments- real property which, on an intestacy might, before 1 January 1926, have devolved on an heir: Law Reform Act 1925 s 3 (8) (UK). However, this decision has been criticised on the grounds that only territorial dignities "soured of the realty" so as to be entailable; Charles Sweet (ed), *Law of Real Property* ed (1911) 45n.

²⁶*Cowley (Earl) v Cowley (Countess)* [1901] AC 450. A peerage is, however, a form of real property, and the descent of a peerage is therefore in accordance with the ordinary rules of land law, modified, however, as outlined elsewhere in this article.

²⁷*Abergavenny's (Lord) Case* (1610) 12 Co Rep 70; 77 ER 1348; *Verney's Case* (1695) Skin 432; 90 ER 191. The actual taking of the seat must be proven: *De Wahull Peerage Case* (1892) cited in *St John Peerage Case* [1915] AC 282, 291. The existence of the writ may be presumed: *Braye Peerage Case* (1839) 6 Cl & Fin 757; 7 ER 882. Where a writ alone is used, a barony by writ, or barony in fee is created. A writ alone was usual till the middle of the reign of Henry VII. Somewhat different rules apply to Irish and Scottish peerages, but as the rules for British peers follows that of the English peerage, and the great majority of peers belong to one or both of these, the rules of the English peerage are what principally concern us here. Early Irish baronies were prescriptive, and descent was always to the heirs male of the body of the presumed grantee: *R v Levet* (1612) 1 Bulst 194; 80 ER 882. There is, however, only one Irish barony by writ in existence, that of Le Poer (now held by the Marquess of Waterford), whose ancestor was called to the Irish House of Lords in 1375: *Le Power and Coroghamore Barony Case* (1921) Report of the Attorney-General 5, 6.

²⁸The first peerage created by letters patent was that for John de Beauchamp, created Lord de Beauchamp and Baron of Kidderminster in 1388. Limitation was to his heirs male of his body. See the *Report as to the Dignity of a Peer of the Realm* (1829 Reprint) vol v 81. Where letters patents were used, the necessity of taking a seat was removed, although formal investiture remained common until the early seventeenth century. The formal investiture of the Prince of Wales and Earl of Chester, revived in 1911, provides a good example of the older form. Some peerages have been created by act of Parliament, or by charter (*De Vere's Case* (1385) 8 State Tr NS 646), and in the early years it was not

A peerage created by letters patent descends according to the limitation expressed in the letters patent, which is almost always to the heirs male of the body of the grantee,²⁹ that is to and through the male line in direct lineal descent from the grantee.³⁰ The patent must specify the patentee, the name of the dignity and its limitation.³¹ A peerage created by writ of summons is presumed to be limited to the heirs of the body of the grantee, that is, to his heirs male or female, lineal or collateral.³²

Without a special limitation in the letters patent,³³ only a peerage created by writ of summons could ever devolve upon a female.³⁴ Scottish peerages however are presumed in similar circumstances to be limited to the heirs male general.³⁵ The patent in English peerages in effect provides a limitation and definition of the effect of the issue of a writ of summons. It was because of these rules of descent were regarded as essential to the nature of a peerage that statutory authority was needed to create peerages for life.³⁶ The

always clear which method had in fact been used. See *The Prince's Case* (1606) 8 Co Rep 1 13b; 77 ER 496.

²⁹ A grant of a peerage to the grantee and his heirs male is valid, though a similar grant of land would be void: *Wiltes Peerage Case*, *supra* n 16.

³⁰ A grant to "heirs male" rather than "heirs male of the body" will be void: *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 ER 293; *Wiltes Peerage Case*, *supra* n 16.

³¹ Modern practice may be seen in Crown Office (Forms and Proclamations Rules) Order 1992, SI 1992/1730, art 2 (1), Schedule, Part III.

³² *Vaux Peerage Case* (1837) 5 Cl & Fin 526; 7 ER 505; *Braye Peerage Case* (1839) 6 Cl & Fin 757; 7 ER 882; *Hastings Peerage Case* (1841) 8 Cl & Fin 144; 8 ER 58. Re collateral heirs, *Roos Barony Case* (1666) 1 Dy 5b; 73 ER 13, re heirs of the half-blood: *Fitzwalter's Case* (1669) Collins's Baronies by writ (1734 edn) 268.

³³ Such limitations were commonly used as a special honour, to for example, the military leaders of the Second World War who lacked sons but had daughters. Lord Louis Mountbatten was created Earl Mountbatten of Burma, with special remainder to his daughters in order of seniority. They were used for commoners only 13 times between 1643 and 1831, but after 1876 became more common, with seven used 1876-92.

³⁴ The doctrine that these baronies by writ (also called baronies in fee) were descendable to the heir general is historically unsound, but now well entrenched in law: *Grey's (Lord) Case* (1640) Cro Cas 601; 79 ER 1117; *Clifton Barony Case* (1673) in Sir Edward Coke, *Coke upon Littleton* ("First Institutes") (reprint 1979 of 19th ed. 1832) 16b; *Vaux Peerage Case* (1837) 5 Cl & Fin 526; 7 ER 505; *Braye Peerage Case* (1839) 6 Cl & Fin 757; 7 ER 882; *Hastings Peerage Case* (1841) 8 Cl & Fin 144 at 157; 8 ER 58; *Wharton Peerage Case* (1845) 12 Cl & Fin 295; 8 ER 1419.

³⁵ *Sutherland Earldom Case* (1771) Maidment's Reports of Peerage Claims 55, applied *Herries Peerage Case*, *supra* n 7; *Mar Peerage Case*, *supra* n 7; also *Annandale Peerage Case* (1844) 1 Scots Peerage 269, considered in *Devon Peerage Case* (1831) 2 Dow & Cl 200; 5 ER 293. Life Peers until 1887 were merely entitled to sit and vote in the House for so long as they held judicial office, and it was only in 1897 that the sons and daughters of Lords of Appeals in Ordinary were given the style "honourable" borne by the children of other peers of the degree of baron.

³⁶ Appellate Jurisdiction Acts 1876-1947 (UK). Despite the Life Peerages Act 1958 (6 & 7 Eliz II c 21) (UK) the Crown still does not have the power to confer peerages for life.

right to a peerage is distinct from a title of honour conferring a particular rank in the peerage, which is merely a collateral matter.³⁷

In the United Kingdom, by long-standing custom, the oath of allegiance must be taken by all newly created or succeeded peers and baronets, and by knights on their creation.³⁸ Upon taking the oath, it is the duty of lords of Parliament to sit in the House of Lords,³⁹ if they can prove their right, although they are disqualified from sitting if they are an alien,⁴⁰ a bankrupt,⁴¹ or under twenty-one years of age.⁴² Those peers who are convicted of treasonable activities cannot receive a writ of summons until they have

Creations must be in accordance with one or other of the statutory measures: *Wensleydale Peerage Case* (1856) 5 HLC 958; 10 ER 1181.

³⁷ *Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey. Degrees are added by an exercise of the prerogative: *Report as to the Dignity of a Peer of the Realm* (1829 Reprint) vol II p 37. Only earls and barons preceded the establishment of Parliament, and a writ of summons does not create any peerage except that of the degree of baron, whatever style is used in the writ: *Norfolk Earldom Case*, *supra* n 7, 17. The Sovereign cannot herself hold a dignity: *Buckhurst Peerage Case* (1876) 2 App Cas 1, per Lord Cairns LC; considered by *Rhondda's (Viscountess) Claim*, *supra* n 7. The Sovereign has traditionally claimed the title of Duke of Lancaster, somewhat oddly, even when a Queen Regnant. This title, dating from a grant to John of Gaunt in 1362, merged with the crown with the accession of Henry VI. The title, being a peerage governed by the ordinary rules of descent, could not have been inherited by Queen Elizabeth I, nor have descended to the present Queen. As the Sovereign is font of honour, they can use whatever title they wish, provided it does not conflict with the royal style and title established by law: *Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey.

³⁸ The form of the oaths to be taken were not affected by the Promissory Oaths Act 1868 (31 & 32 Vict c 72) (UK), s 14 (5) of which provided however that in place of the oaths of allegiance, supremacy, or abjuration there be an oath in the form of the new oath of allegiance provided in the act.

³⁹ Every peer, unless disqualified by some specific cause, is entitled to the issue of a writ of summons: *Bristol's (Earl of) Case* (1626) 3 Lords Journals 537, 563. A peer, once he has received his writ, must attend as often as he reasonably can, or obtain leave of absence for the duration of a parliament: House of Lords Standing Orders (1979) (Public Business) no 20 (1).

⁴⁰ By the common law, s 3 Act of Settlement 1700 (12 & 13 Will III c 2) (Eng), s 31 schedule 4 part I British Nationality Act 1948 (11 & 12 Geo VI c 56) (UK). Citizens of the Irish Republic are however acceptable: s 10 British Nationality Act 1948 (11 & 12 Geo VI c 56) (UK), *R v Speyer, R v Cassel* [1916] 1 KB 595 (DC); affirmed [1916] 2 KB 858.

⁴¹ Bankruptcy Disqualification Act 1871 (34 & 35 Vict c 30) (UK) s 6; *Bankruptcy Act 1883* (UK) (46 & 47 Vict c 52) s 32 (1) (a), s 32 (3); *Bankruptcy (Scotland) Act 1913* (UK) (3 & 4 Geo V c 20) s 183; *Bankruptcy Act 1914* (UK) (4 & 5 Geo V c 59) s 106 (1).

⁴² House of Lords Standing Orders (1979) (Public Business) no 2. Order originally passed 22 May 1685. The Union with Scotland Act 1706 (Eng) (5 Ann c 8) ss 6, 7 has similar provisions.

served their sentence or been pardoned.⁴³ Peers are disqualified from voting for, or themselves obtaining membership of, the House of Commons.⁴⁴

III. PEERS OF SCOTLAND, IRELAND AND ENGLAND

The statutory recognition accorded to Scottish peers in England by the Union with Scotland Act 1706 (Eng)⁴⁵ was necessary to settle two points which would otherwise remain uncertain. Firstly, if all Scottish peers had been automatically admitted to the new House of Lords, Scotland would have been over-represented, given that the English peerage was, and remains, proportionately much less numerous than the Scottish.⁴⁶ It was therefore necessary to provide that automatic membership be denied Scottish peers, who would instead be represented by a number of elected representative peers.

Secondly, Scottish and Irish peers had been denied legal recognition by the English Courts, on the reasoning applied in *Calvin's Case*.⁴⁷ This in turn relied upon *Richmond's (Earl of) Case*,⁴⁸ which was decided before the King of Scotland became also King of England. *Calvin's Case* found that although a Scotsman was also an Englishman as a subject of the king of England, this did not make him an English earl. Both cases and their conclusions were approved in *Lord Advocate v Walker Trustees*.⁴⁹

This was surprising given that the policy and principles behind *Calvin's Case* and the *Richmond's (Earl of) Case* had been superseded by the two Acts of Union. *Lord Advocate v Walker Trustees* and *Calvin's Case* have been relied on in an attempt to show that British peers are not recognised in New Zealand law,⁵⁰ without appreciating that *Calvin's Case* had been overtaken by events, and *Lord Advocate v Walker Trustees* should not be regarded as good authority on this point. *Lord Advocate v Walker Trustees* may readily be distinguished, as the discussion in that case was not applicable to the peerage at all, but rather limited to heritable offices.⁵¹

⁴³ Forfeiture Act 1870 (UK) (33 & 34 Vict c 23) s 2; Criminal Justice Act 1948 (UK) (11 & 12 Geo VI c 58) ss 79, 83 (3), Schedule 9, Schedule 10, Part I. This was originally provided for by the Treason and Sedition Act 1661 (Eng) (13 Chas II st 1 c 1) s 7.

⁴⁴ Except for Irish peers not possessing a peerage otherwise entitling them to membership. Many Irish peers now possess such titles. Those who do not may stand for, and be elected to, the House of Commons, and may vote at parliamentary elections: *Peerage Act 1963* (UK) s 5 (a), 5 (b); *Re Parliamentary Election for Bristol South East* [1964] 2 QB 257.

⁴⁵ 5 Ann c 8.

⁴⁶ It is estimated that there were 154 peers for 1,250,000 people in Scotland, and 164 English peers for 5,500,000.

⁴⁷ *Supra* n 3.

⁴⁸ *Supra* n 4.

⁴⁹ *Supra* n 3

⁵⁰ Stevens, *Supra* n 1, 30.

⁵¹ The point in *Lord Advocate v Walker Trustees* relied upon by Stevens is that made by Lord Atkinson that peerages created in one kingdom were not recognised in another. This point was in fact obiter, as the case was concerned with a heritable office covered by article 20 of the Union with Scotland Act 1706 (Eng) (5 Ann c 8). The House of Lords held that the act did not enlarge the rights of the Usher of the White Rod, so as to entitle

Calvin's Case cannot itself be authority for the proposition that British peers are not recognised in New Zealand law. Firstly, we are concerned with recognition accorded by the common law, which is the basis for the law of New Zealand. The King of England was a different legal person from the King of Scotland in 1607, but the King of England was king of all his dominions, wherever situated. *Calvin's Case* concerned the recognition accorded peers created by an alien legal system.

Secondly, the question of why it was held that someone might be a subject, yet not a peer, clearly turned on the definition of an earl, and the definition of peerage offered was incomplete. In *Sir John Douglas's Case* Littleton J observed that:

The plaintiff is an earl in Scotland, but not in England and if our sovereign Lord the King grant to a duke of France a safe conduct to enter into his realm, if the duke cometh and is to sue an action here he ought not to name himself duke, for he is not a duke in this land, but only in France.⁵²

The judge cited the *Richmond's (Earl of) Case* in which it was held that "an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm".⁵³

Both cases concerned foreign titles of nobility, and to that extent they were and remain good law. However, the reasoning in those cases was followed in *Calvin's Case*, decided after the succession of King James VI to the throne of England. Four reasons were advanced for the non-recognition of a Scottish peer in England. These were that England and Scotland were separate and distinct kingdoms, that they were governed by distinct and separate Parliaments, that each had a separate judicial or municipal law, and that each had separate nobilities.

Each of these points is undoubtedly important, but equally it is clear that they had greater relevance in that case than they do when considering the legal status of peers in New Zealand. This is because the laws of New Zealand are germane to those of England, something which could not be said even now of Scots law, and because of the very absence of a peerage in New Zealand. The point upon which the judge relies most strongly in *Calvin's Case* is that the nobility of an Englishman is by the King's creation and not by nature, so that a Scottish peer was not in England noble, because his nobility was due to the act of another sovereign. However, before the concept of the divisible Crown developed, it was undoubtedly true that the king was king equally in England and in New Zealand.

Following the underlying principle of *Calvin's Case* it is clear that at that time, if not later, a British peer would be legally recognised in New Zealand. This is because the nobility conferred by the Sovereign's creation, due to the act of the British Sovereign, ennobled the blood of a subject equally in New Zealand as any other realm. The nobility was not by nature, nor by the creation of another sovereign. The colonies were not separate and distinct kingdoms, nor did their Parliaments enjoy the supremacy which that

him to the fees of honour from all recipients of honours (peerages, baronets and knights) in England as well as in Scotland.

⁵²Douglas v Milford (1480) YB 20 Edw IV 6 at 16 per Littleton J, cited in *Calvin's Case*, Supra n 3, 395-6.

⁵³Supra n 4.

at Westminster enjoyed. The law in each was the law of England, subject to statutory alteration. Following this reasoning, legal recognition was accorded the British peerage in New Zealand law, and nothing has changed which would deprive them of this recognition.

Before the various acts of parliamentary union the peers of England, Ireland and Scotland were each a full member of their respective parliaments, yet not peers in the other countries,⁵⁴ although they shared the same person as sovereign. Although after the Unions only some Scottish and Irish peers were admitted to the House of Lords, all enjoyed the privileges of peerage,⁵⁵ as each was a peer of the same Crown. No new Scottish peerages were to be created after the Union with Scotland Act 1706 (Eng),⁵⁶ although there was formerly provision for creating new Irish peers, and the Peerage Act 1963 (UK) admitted all surviving peers of Scotland, though not of Ireland,⁵⁷ to seats in the House of Lords.⁵⁸

IV. THE GENERAL PRIVILEGES OF PEERAGE

The rights and duties of peers depend entirely upon custom.⁵⁹ The principal legal distinction of British peers is their right to sit and vote in Parliament.⁶⁰ That they do not have a seat in the New Zealand legislature cannot of itself be evidence that they have no legal standing here. The position of the peerage in New Zealand is akin to that of the Irish peerage. Irish peers are entitled to the privileges of peerage,⁶¹ but not to a seat and vote in

⁵⁴ *Sir John Douglas's Case (Douglas v Milford)*, *supra* n 52, per Littleton J, cited in *Calvin's Case*, *supra* n 3, 395-6.

⁵⁵ By the Union with Scotland Act 1706 (Eng) (5 Ann c 8) article 23 all Scottish peers were henceforth to be peers of Great Britain, and to enjoy the same privileges as English peers, excepting individual entitlement to a seat in the newly re-constituted House of Lords.

⁵⁶ 5 Ann c 8.

⁵⁷ The election of new Irish representative peers was effectively ended by the Irish Free State (Agreement) Act 1922 (UK) (13 Geo V c 2), and the last survivor died in 1961; *Petition of the Earl of Antrim* [1967] 1 AC 691.

⁵⁸ Section 4.

⁵⁹ *Berkeley Peerage Case* (1861) 8 HL Cas 21; 11 ER 333.

⁶⁰ *Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey. Not all peers however are Lords of Parliament (principally the Irish peers not also possessing another peerage entitling them to a seat), and some Lords of Parliament, the bishops, are not peers. Ecclesiastical dignitaries have formed part of the House of Lords from the earliest times, though they were excluded from 1640 to 1661: *Clergy Act 1640* (Eng) (16 Chas II c 27); *Clergy Act 1661* (Eng) (13 Chas 2 c 2).

⁶¹ Unless he chooses to waive them in order to become a member of the House of Commons. At present, there is only one such, the 6th Earl of Kilmorey (created 1822), who calls himself the Right Honourable Richard Needham, MP. He is the grandson of the last surviving Irish representative peer.

Parliament.⁶² The validity of the ratio decidendi in *Calvin's Case* even within the United Kingdom must be reconsidered in light of the changed position of the Crown after the Union with Scotland Act 1706 (Eng)⁶³ and the Union with Ireland Act 1800 (GB).⁶⁴

In the second part of the modern letters patent for the creation of an hereditary peerage, the more general privileges of peerage are conferred. It is provided that:

[H]e and his heirs male aforesaid successively may enjoy and use all the rights privileges pre-eminent immunities and advantages to the degree of a Baron duly and of right belonging which other Barons of Our United Kingdom have heretofore used and enjoyed or as they do at present use and enjoy.

That the rights and privileges are said to be those of the barons of the United Kingdom does not mean, as Stevens believed, that these privileges are localised or confined to the United Kingdom. While the peerage of Scotland and the peerage of Ireland have obtained by legislative enactment the same privileges as those of England, they are not part of the peerage of England. The Union with Scotland Act 1706 (Eng) article 23 provided that all Scottish peers were henceforth to be peers of Great Britain, and to enjoy the same privileges as English peers, excepting individual entitlement to a seat in the newly re-constituted House of Lords.⁶⁵

The Union with Ireland Act 1800 (GB) similarly provided that all Irish peers were to be considered as peers of the United Kingdom, and were to enjoy all the privileges of peerage except membership of the House of Lords. However, peers who were elected to the House of Commons were to not have the privileges of peerage while remaining a member.⁶⁶ The Union with Scotland Act 1706 (Eng) made no mention of Scottish peers being advanced to the status of peers of the United Kingdom, nor did either act convert English peers into peers of either Great Britain or of the United Kingdom.⁶⁷ However, that did not mean that peers of Scotland have no legal recognition in England or Northern Ireland now because they were never said to be peers of the United Kingdom, only of Great Britain. This playing with words confuses the two issues of sovereignty and title.

⁶²Robinson v Rokeby (Lord) (1803) 8 Ves 601; 32 ER 488; *Irish Peer Case* (1806) Russ & Ry 117; 168 ER 713. By the Union with Scotland Act 1706 (Eng) (5 Ann c 8) article 23 all Scottish peers were henceforth to be peers of Great Britain, and to enjoy the same privileges as English peers, excepting individual entitlement to a seat in the newly re-constituted House of Lords.

⁶³5 Ann c 8.

⁶⁴39 & 40 Geo III c 67 article 4.

⁶⁵A peerage is a dignity to which is attached the right to a summons by name to sit and vote in Parliament, although that right may be altered or qualified by statute; *Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey; *Fermoy Peerage Case* (1856) 5 HL Cas 716, 741; 10 ER 1084, per Crowder J.

⁶⁶Article 4.

⁶⁷The separate peerages of England, Scotland, Ireland, Great Britain, and the UK are identified principally by the House of Lords for which they were created. As the English and Scottish Parliaments were subsumed into that of Great Britain in 1707, no new peers of England or of Scotland have been created since then (Union with Scotland Act 1706 (Eng) (5 Ann c 8) art 22).

All are equally hereditary counsellors to the Sovereign of the United Kingdom, however styled.

The benefits of a peerage, apart from a seat in the Lords, include, in Britain a right to be excused as of right from jury service,⁶⁸ a right to be excused from serving as a witness,⁶⁹ and freedom from arrest in civil causes.⁷⁰ The immunity from civil arrest is founded on the fact that the peerage is an essential part of the constitution and working of Parliament. The members of the House should be able to attend to their duties without interruption or molestation. However, peers who are arrested will not be discharged if they have never sat in Parliament.⁷¹ As a corollary of the latter exemption, peers should not be appointed receivers,⁷² because they could not be arrested to compel performance.⁷³

⁶⁸ *Enfield's (Viscount) Case* (1861) *The Times*, 8 February 1861; Juries Act 1974 (UK) s 19 (1), Schedule 1, Part III. This is an extension of the immunity from attachment enjoyed by peers, and is founded both on the common law and the statutory exemption. A peer, if summoned for jury service, is subject to challenge prompter honoris respectam: Coke, *supra* n 34, 156b; Sir William Blackstone, *Commentaries on the Laws of England* (reprint 1978 of 1783 edn) vol III 361. It has also been held that Irish peers ought not to serve on a grand jury unless they were members of the House of Commons: *Irish Peer Case* (1806) *Russ & Ry* 117; 168 ER 713.

⁶⁹ This also is a common law right, but, as with all the parliamentary immunities and privileges, a Lord of Parliament must have taken the oath of allegiance to claim the privileges: *Chesterfield's (Earl of) Case* (1720) 21 Lords Journals 327. To subpoena a peer as a witness is a breach of privilege: *Salisbury's (Earl of) Case* (1626) 3 Lords Journals 630.

⁷⁰ Whether the cause is civil or criminal of course depends upon the motive for the proposed arrest. Peers' immunity, however, does not extend to criminal charges, nor to refusing to give security for the peace: *R v Carmarthen (Marquis of)* (c.1720) *Fortes Rep* 35a; 92 ER 890; *Couche v Arundel (Lord)* (1802) 3 East 127; 102 ER 545; *Cassidy v Steuart* (1841) 2 *Man & G* 437; 133 ER 817. Peers may be compelled to give recognisances to keep the peace: *R v Sevenoaks (Inhabitants)* (1845) 7 QB 136; 115 ER 440. Peers are free from arrest for contempt, but only where the action and consequences are civil: *Anon* (1572) *Dal* 83; 123 ER 292; *Story v Pawlet* (1580) *Cary* 73; 21 ER 39; *Pheasant v Pheasant* (1670) 2 *Vent* 340n; 86 ER 475; *Thornby d Hamilton (Duke of) v Fleetwood* (1713) *Cooke Pr Cas* 8; 125 ER 924; *Wellesley v Beaufort (Earl of)* (1831) 2 *Russ & M* 639, 665; 39 ER 538; *Stourton v Stourton* [1963] 1 All ER 606. Civil immunity against imprisonment or restraint for Lords of Parliament, without the order or sentence of the House, extends to a period of forty days before and after a meeting of Parliament: *Shrewsbury's (Countess of) Case* (1612) 12 *Co Rep* 94; 77 ER 1369; House of Lords Standing Orders (1979) (Public Business) no 77, 78. Minor peers (those under 21 years of age), peeresses by marriage, or widows of peers do not share the parliamentary immunity, though they enjoy the general privileges of peerage: *Anon* (1676) 1 *Vent* 298; 86 ER 192.

⁷¹ *Banbury's (Lord) Case* (1706) 2 *Ld Raym* 1247; 92 ER 321; *Re Hanley (Lord)* (1849) 7 *State Tr NS App A* 1130.

⁷² *A-G v Gee* (1813) 2 *Ves & B* 208; 35 ER 298. Nor can they give surety of cognisance: *Graham v Sturt* (1812) 4 *Taunt* 249; 128 ER 324; *Burton v Hill* (1822) 1 *Dow & Ry KB* 126.

The immunity from arrest has been held to apply whether Parliament was actually sitting, under the general privilege of peers,⁷⁴ nor can it be waived.⁷⁵

Irish peers who are members of the House of Commons are not free from arrest for civil causes. However, other Irish peers are, provided that they have voted at the election of the Irish representative peers,⁷⁶ an event which has not taken place since 1919.⁷⁷ The same rule formerly applied to Scottish peers,⁷⁸ all of whom however now enjoy the privilege as members of the House.⁷⁹ Peers, being the hereditary counsellors of the Sovereign,⁸⁰ have freedom of access to the monarch in relation to public affairs.⁸¹ The House of Lords collectively enjoys freedom of speech.⁸² The remarried divorced wives of peers, or peers' widows who remarry, lose the privileges of peerage.⁸³ The husband of a peeress in her own right has no right to any title.⁸⁴

⁷³ However a court order can be enforced by sequestration: *Pheasant v Pheasant* (1670) 2 Vent 340n; 86 ER 475; *Eyre v Shaftesbury (Countess of)* (1722) 2 P Wms 103, 110; 24 ER 659.

⁷⁴ *Foster v Jackson* (1615) Hob 52, 61; 80 ER 201; *Couche v Arundel (Lord)* (1802) 3 East 127; 102 ER 545; *Stourton v Stourton* [1963] 1 All ER 606.

⁷⁵ *Walker v Grosvenor (Earl of)* (1797) 7 Term Rep 171; 101 ER 915.

⁷⁶ *Davis v Rendlesham (Lord)* (1817) 7 Taunt 679; 129 ER 270; *Storey v Birmingham* (1823) 3 Dow & Ry KB 488; *Coates v Hawarden (Lord)* (1827) 7 B & C 388; 108 ER 768; *Digby v Stirling (Lord)* (1831) 8 Bing 55; 131 ER 321. Protection also extended to being sued by capias.

⁷⁷ The Earl of Roden, elected 22 December 1919.

⁷⁸ *Digby v Stirling (Lord)* (1831) 8 Bing 55; 131 ER 321; *Smart v Johnstone* (1837) 3 M & W 69; 150 ER 1060.

⁷⁹ *Peerage Act 1963 (UK)* s 4.

⁸⁰ See, generally, Luke Pike, *Pike's Constitutional History of the House of Lords* (1894) 251-254. Pike believed that the claim that peers were individually hereditary counsellors to the Sovereign only dated from relatively late times, being based upon the original role of the curia regis. The idea led to Charles I summoning the peers to York in 1640 for advice, and to the meeting of the peers in 1688 when James II had fled.

⁸¹ *Report as to the Dignity of a Peer of the Realm* (25 May 1820, 1829 Reprint) vol I p 14; Members of the House of Commons enjoy this right collectively, but only those individual members who are Privy Counsellors or members of the Royal Household enjoy it individually. The peers' right of access is based upon the articles in the accusations against Hugh le Despenser the elder and younger, in the reign of Edward II, and is of doubtful authority. In practice, an audience must be sought through an officer of the royal household. Eldon thought that peers could only tender advice, not, as of right, carry an address or petition to the Sovereign: Charles Lord Colchester (ed), *The Diary and Correspondence of Charles Abbot Lord Colchester* (1861) vol III 606 (12 March 1829).

⁸² Bill of Rights 1688 (Eng) (1 Will III & Mary Sess 2 c 2) s 1, reinforcing the Privilege of Parliament Act 1512 (Eng) (4 Hen VIII c 8).

⁸³ *Suffolk's (Duchess of) Case* (1557) Owen 81; 74 ER 914; *Acton's Case* (1603) 4 Co Rep 117a; 76 ER 1107; *Rutland's (Countess of) Case* (1606) 6 Co Rep 52b; 77 ER 332; *Countess Rivers' Case* (1650) Sty 252; 82 ER 687; *Dacres' (Lady) Case* (1661) 11 Lords Journals 298; *Anon* (1676) 1 Vent 298; 86 ER 192; Compare *Cowley (Earl) v Cowley*

The absence of any "rights privileges pre-eminences immunities and advantages" conferred by New Zealand law on peers does not necessarily mean that the use of "the said name state degree style dignity title and honour of Baron" is not legally recognised in New Zealand. The legislative function is clearly absent, but only because there is no House of Lords. New Zealanders who are peers are entitled to sit in the House of Lords,⁸⁵ and the Peerage Act 1963 (UK) has now removed the restriction on peeresses in their own right from receiving a writ of summons.⁸⁶

Interestingly, the letters patent of 1958 creating Prince Charles Prince of Wales and Earl of Chester speaks of granting the name style title dignity and honour of the principality and earldom, but makes no provision for the possession of "a seat place and voice in the Parliaments". Nor does it refer to any "rights privileges pre-eminences immunities and advantages" which he might enjoy. There is also no territorial designation. It does however provide "that he might preside there and may direct and defend those parts". It specifically commands that he may have the title unto him and his heirs kings of the United Kingdom of Great Britain and Northern Ireland and other realms and territories- thereby including New Zealand.⁸⁷

V. PEERS AS LORDS OF PARLIAMENT

(Countess) [1901] AC 450, HL, where the House declined to hold that the use of a title by a remarried former peeress was actionable.

⁸⁴ *Talboy Peerage Case* (c.1526) Collins's Baronies by writ (1734 edn) 11.

⁸⁵ Section 3 of the Act of Settlement 1700 (Eng) (12 & 13 Will III c 2), which provides that "no person born out of the Kingdoms of England Scotland or Ireland or the dominions thereunto belonging ... shall be capable to be of the privy council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands tenements or hereditaments from the Crown to himself or to any other or others in trust for him". This has not in practice been extended to the overseas territories of the Sovereign even though they cannot be said to be dominions of the kingdoms. It of course covers peerages both as conferring membership of Parliament, and as hereditaments granted from the Crown. See Law Reform Committee, *Report on the Imperial Laws Application Bill* (1988) Explanatory Material Appendix IB 58-59.

⁸⁶ Reversing the effect of the decision in *Rhondda's (Viscountess) Claim*, *supra* n 7. Peeresses in their own right now enjoy all the privileges, and disabilities, of peers; *Peerage Act 1963* (UK) s 6. Women were entitled to succeed to peerages, but were always denied the right to a seat in the House by virtue of their title: See AB Keith (ed), *The Law and Custom of the Constitution* (5th ed 1922) vol 1 227.

⁸⁷ Letters Patent, 26 July 1958. The position of princes of the Royal House is equally interesting. Who is this individual whom we all know as the Duke of Edinburgh? Should we call him Prince Philip if we do not recognise British peerages? Because the status of prince depends solely upon the royal prerogative, and are not territorially limited in any way, they are in a different position for the peerage. It might be appropriate to update the royal style in this respect also, and thus speak of "HRH Princes/Princesses of New Zealand".

While the legal definition of a peer has varied over the centuries, English law has been reasonably settled for the last 500 years.⁸⁸ The essential nature of a British peerage, unlike a foreign title of nobility, is that it is a personal dignity. This is clearly shown in the wording of modern letters patent for the creation of an hereditary peerage,⁸⁹ which state that the Sovereign intends to:

Advance create and prefer Our [xxx] to the state degree style title and honour of Baron [xxx] of [xxx] in Our County of [xxxx] And ... do appoint give and grant unto him the said name state degree style dignity title and honour of Baron [xxx] to have and to hold unto him and the heirs male of his body lawfully begotten and to be begotten Willing and by these Presents granting for Us Our heirs and successors that he and his heirs male aforesaid and every of them successively may have hold and possess a seat place and voice in the Parliaments and Public Assemblies and Councils of Us Our heirs and successors within Our United Kingdom amongst other Barons And also that he and his heirs male aforesaid successively may enjoy and use all the rights privileges pre-eminent immunities and advantages to the degree of a Baron duly and of right belonging which other Barons of Our United Kingdom have heretofore used and enjoyed or as they do at present use and enjoy.

The patent establishes and confirms the essential function of the peer as a lord of Parliament. The Sovereign is legally and practically the sole fount of titles and awards of honour and dignity,⁹⁰ which are awarded by virtue of an exercise of the prerogative. Peers are created by the Queen on the advice of her British Ministers. All those now created are peerages of the United Kingdom, and each carries with it the right to a seat in the House of Lords.⁹¹

The powers of the Crown respect of granting honours and dignities are unlimited, so that dignities of a kind not used before may be created.⁹² The jurisdiction to determine a claim to a dignity is also vested solely in the Crown.⁹³ Neither can a question of dignity or honour be tried by a court of law.⁹⁴ However, in practice all claims are referred to the

⁸⁸That is, the dignity to which is attached the right of a summons by name to sit and vote in Parliament: *Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey.

⁸⁹The royal warrant to pass the Great Seal receives the royal sign manual superscribed, countersigned by the Secretary of State for the Home Department. The sealed letters patent are enrolled on the patent rolls. In some cases the patents have purported to give precedence, although this cannot alter precedence in the House of Lords, which is regulated by the House of Lords Precedence Act 1539 (Eng) (31 Hen VIII c 10): *Mountjoy's Case* (1628) 3 Lords Journals 774, cited in 8 State Tr NS 608n.

⁹⁰*Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey.

⁹¹Although with reform of the House of Lords proposed by the Labour Party this may change in the not too distant future.

⁹²*Report as to the Dignity of a Peer of the Realm* (1822, 1829 Reprint) vol II 37.

⁹³*King's Prerogative in Dignities* (c.1607) 12 Co Rep 112; 77 ER 1388. The House of Lords can only decide existing peerages, including those temporarily in abeyance, if the claim is referred to it by the Crown.

⁹⁴*Cowley (Earl) v Cowley (Countess)* [1901] AC 450.

House of Lords, which then refers the matter to the Committee for Privileges,⁹⁵ although the inherent jurisdiction of the House is limited to claims to a right to vote.⁹⁶

As the House has for a long time reserved the right to regulate its own membership, a new type of dignity would not necessarily entitle the recipient to a seat in the Upper House of the British Parliament.⁹⁷ It was at one time thought that the Crown could not confer upon a peer of Scotland a peerage of the United Kingdom entitling him to a hereditary seat in the House of Lords.⁹⁸ This view was, however, rejected by the judges in 1782, in advising the House upon the claim of the Duke of Hamilton and Brandon to a writ of summons.⁹⁹

Peerage is the dignity to which is attached the right of a summons by name to sit and vote in Parliament.¹⁰⁰ There are however some peers who are not lords of Parliament, and lords of Parliaments who are not peers- the lords spiritual. The Crown, although able to create a life peerage, could not create such a peerage carrying with it any office of honour- a term which includes the right to a seat in the House of Lords. As the issue of a writ of summons followed by the taking of his seat by the recipient created a hereditary peerage,¹⁰¹ it was therefore held to be impossible for the House to allow one whose peerage was by letters patent limited to his life to take his seat.¹⁰²

A peerage which includes a course of inheritance contrary to the rules of the common law cannot be created without an act of Parliament.¹⁰³ Law Lords were admitted to the House of Lords by statute in the late nineteenth century,¹⁰⁴ and the restriction was removed for general purposes with the passage of the Life Peerage Act 1958 (UK).¹⁰⁵ Membership of a British legislative chamber would not, on its face, be sufficient standing

⁹⁵Here the actual judicial process is undertaken by several Lords of Appeal in Ordinary, thereby giving the decision very strong juridical value. However, the House of Lords of course also claims the right to decide the entitlement of a newly created peer to vote in the House: *Wensleydale Peerage Case* (1856) 5 HLC 958; 10 ER 1181.

⁹⁶Although the House also claims the right to decide Irish peerages, under article 4 of the Union with Ireland Act 1801 (GB) (39 & 40 Geo III c 67): *Waterford's (Earl of) Case* (1832) 6 Cl & Fin 133; 7 ER 648.

⁹⁷As in the *Wensleydale Peerage Case* (1856) 5 HLC 958; 10 ER 1181.

⁹⁸*Queensberry's (Duke of) Case* (1719) 1 P Wms 582; 24 ER 527, HL.

⁹⁹*Brandon's (Duke of) Case* (1782) 8 State Tr NS 66; 36 Lords Journals 516.

¹⁰⁰*Norfolk Earldom Case*, *supra* n 7, 17, per Lord Davey.

¹⁰¹*The Prince's Case* (1606) 8 Co Rep 1; 77 ER 481.

¹⁰²*Wensleydale Peerage Case* (1856) 5 HLC 958; 10 ER 1181. The royal prerogative to create a life peer was not denied. What was denied was whether this conveyed a right to a seat in Parliament. Was it a mere title of honour, giving rank and precedence, but not a place in Parliament? There had been no life peers for 400 years, and this precedent was enough to convince the lords that there should be none now. Interestingly, peerages pur autre vie, or for the life of another, have been created: *Report as to the Dignity of a Peer of the Realm* (25 May 1820, 1829 Reprint) vol II p 171; *Devon Peerage Case* (1811) 2 Dow & Cl 200; 5 ER 293.

¹⁰³*The Prince's Case* (1606) 8 Co Rep 1; 77 ER 481.

¹⁰⁴Appellate Jurisdiction Act 1876 (UK) (39 & 40 Vict c 59

¹⁰⁵6 & 7 Eliz II c 21.

to entitle one to legal recognition in New Zealand. In this respect the reasoning in *Calvin's Case* applies.

It will be seen that the essence is of a hereditary entitlement to a place in Parliament. In this respect the British peerage (for the Scottish and Irish practice mirrored the English) is distinct from the continental European, where the stress lay upon nobility of blood. The English, being less socially exclusive, always had an aversion to anything approaching the noble castes of continental Europe.¹⁰⁶ If a peer of Scotland was not entitled to be regarded legally as a peer of England, this was principally because he lacked the necessary right to a seat in the English Parliament, a distinction since rendered obsolete. It was never applicable for the colonies, dominions or realms of the Queen, at least in part because of the imperial jurisdiction of the English, and later British Parliament.

There is no separate peerage of New Zealand, and New Zealanders have in the past been ennobled in the British peerage for services to New Zealand. The decision in *Calvin's Case* was based upon the legislative function of the peer. Yet as the Parliament at Westminster had imperial jurisdiction it would not be so very surprising if peers also had imperial status. The peerage of the United Kingdom was equally the peerage of the sovereign's overseas territories.¹⁰⁷

VI. APPLICABILITY OF THE PEERAGE LAW TO NEW ZEALAND

It is necessary for a distinction to be drawn between peerage titles conferred by a foreign sovereign, and peerages and baronetcies conferred by our monarch but in the sovereignty of another realm.¹⁰⁸ First, there is a distinction between peerages and baronetcies, although both are dignities (as are knighthoods). Secondly, an earl in Scots law or a duke in French law might not have been recognised by the common law of England,¹⁰⁹ but we are concerned here with the common law of New Zealand. This law is based upon the common law of England, which undoubtedly recognised peers of Scotland, Ireland as well as those of England, even if only because of statutory impositions upon the common law.¹¹⁰

¹⁰⁶Because Henry II successfully reversed the tendencies of Stephen's reign, England never developed a nobility with powers of life and death over their subjects, and neither did the privileges of noble birth extend equally to all members of a family. The nobility did not acquire independence as in France and Germany. Generally, see MT Clanchy, *England and its Rulers, 1066-1272: Foreign Lordship and National Identity* (1983) 121.

¹⁰⁷The validity of imperial titles was not doubted in Canada, where in 1919 the Canadian Parliament requested the imperial Parliament at Westminster to legislate to bring an end to the validity of hereditary titles granted to certain Canadian residents on the death of the original holders. See AB Keith, *The Dominions as Sovereign States* (1938) 86.

¹⁰⁸Note, this distinction was not developed by Stevens, *supra* n 1, 32.

¹⁰⁹*Sir John Douglas's Case (Douglas v Milford)* (1480) YB 20 Edw IV 6, 16 per Littleton J, cited in *Calvin's Case*, *supra* n 3, 395-6.

¹¹⁰Union with Scotland Act 1706 (Eng) (5 Ann c 8) article 23; Union with Ireland Act 1800 (GB) (39 & 40 Geo III c 67) article 4.

It could be argued that the law does not recognise peerages in New Zealand, because they have a territorially linked right to a seat in Parliament. However, as argued above, entitlement to a seat in Parliament is only one of the attributes of peerage. While the Acts of Union were necessary to regulate the position of Scottish and Irish peers in relation to their English counterparts, this was because of the need to restrict membership of the House of Lords, a qualification which does not apply to New Zealand.

Even though the common law of England would appear to recognise peers wherever in the Queen's dominions they might live, it could be argued that the common law of New Zealand does not accord them such recognition. This turns upon whether the peerage law of England can be said to have extended to New Zealand.

The laws of New Zealand are based upon the reception of English laws when this country was first settled as a British colony last century.¹¹¹ For greater certainty, the English Laws Act 1858 (NZ)¹¹² provided that the laws of England as existing on 14 January 1840 were deemed to be in force in New Zealand.¹¹³ However, following colonial precedents, this was to be only in so far as those laws were applicable to the circumstances of the colony and in so far as the English laws were in force in New

¹¹¹ *R v Symonds* (1847) NZ PCC 387; *Veale v Brown* (1868) NZCA 152, 157; *Wi Parata v Wellington (Bishop of)* (1877) 3 NZ Jur (NS) SC 72; *Cooper v Stuart* (1889) 14 App Cas 286, 291; *R v Joyce* (1906) 25 NZLR 78, 89, 112; *Waipapakura v Hempton* (1914) 33 NZLR 1065, 1071; *Re the Bed of the Wanganui River* [1962] NZLR 600, 624; *Re the Ninety Mile Beach* [1963] NZLR 461, 475-6.

¹¹² 21 & 22 Vict no 2 (NZ).

¹¹³ This act was passed, in the words of the long title, "to declare the Laws of England, so far as applicable to the circumstances of the Colony, to have been in force on and after the Fourteenth day of January, one thousand eight hundred and forty". The purpose of the statute was really to clarify the uncertainty as to whether or not all Imperial acts passed prior to 1840 were in force in New Zealand, if applicable. Doubts had been raised by the passage of the English Acts Act 1854 (NZ) (18 Vict no 1), and the *English Acts Act 1855* (NZ) (19 Vict no 3), both entitled "An Act for bringing into operation within the Colony certain Acts of the Imperial Parliament". These listed Imperial statutes that were to be deemed part of the laws of New Zealand, but were silent as regards the application of other Imperial statutes, and the common law of England. Prior to 1865 the prevalent view in England appeared to be that any law that seriously conflicted with the principles of the common law of England was repugnant to the laws of England, and consequently colonial laws were from time to time disallowed solely on the ground of such supposed repugnancy. The Colonial Laws Validity Act 1865 (UK) (28 & 29 Vict c 63) allowed colonial legislatures to change the common law, but not Imperial statutes having force in the colony. Since the New Zealand legislature lacked the authority to repeal Imperial statutes applicable to the colony until the passage of the New Zealand Constitution (Amendment) Act 1947 (NZ), the 1858 act, its predecessors and successors till 1947 had only declaratory effect. Similarly, the common law would have been in force in New Zealand without the passage of the English Laws Act 1858 (UK) (21 & 22 Vict no 2), since the colonial legislature lacked, until 1865, the authority to change the fundamental rules of the common law, and one of these was that the common law was imported by the settlers.

Zealand immediately before the commencement of the act.¹¹⁴ The principle of this act has been followed in all legislation passed since then.¹¹⁵

Although the Crown could rely on the royal prerogative to govern colonies,¹¹⁶ it was early established that settled colonies took English law, including the right to a Parliament. Once the right to call a local assembly was granted without reserve, the Crown lost the right to legislate even for conquered territories.¹¹⁷ In ceded or conquered territories the laws remained unless they were immoral or inconsistent with the transfer of sovereignty. The Crown could of course freely legislate under the prerogative in these colonies.¹¹⁸ It was thought that a conquered (or ceded) territory could take on some of the characteristics of a settled colony through the departure or expulsion of the original inhabitants and an influx of settlers.¹¹⁹

Alternatively, this could occur where local laws were "barbarous or unchristian, or at any rate unsuited to settlers from civilised nations".¹²⁰ New Zealand was deemed to fall into this latter category, because the Maori did not have laws as the settlers knew them.¹²¹ There was, however, no doubt that in all cases colonial laws were subject to the over-

¹¹⁴ *King v Johnston* (1859) 3 NZ Jur (NS) SC 94.

¹¹⁵ Though imperial legislation now only applies if it is included in the schedule to the Imperial Laws Application Act 1988 (NZ).

¹¹⁶ *Calvin's Case*, *supra* n 3.

¹¹⁷ In settled colonies there could not, of course, be a general power of ordinary legislation, since this does not exist in the UK. See *Campbell v Hall* (1774) 20 State Trials 239, 328-9; 98 ER 1045, per Lord Mansfield CJ; *In re Natal (Lord Bishop of)* (1864) 3 Moo PCC NS 115; 16 ER 43; *Sammut v Strickland* [1938] AC 678, 701; *Sabally and N'Jie v A-G* [1965] 1 WLR 273, 279, per Salmon LJ; *Wacando v Commonwealth of Australia* (1981) 37 ALR 317, 324, 332. Sir Kenneth Roberts-Wray disagreed, at least as far as the Crown's constituent powers (as distinct from ordinary powers) are concerned. See his *Commonwealth and Colonial Law* (1966) 158-162. This prerogative is lost at least while an effective legislature remained in effective existence. In the event that this is no longer in existence, see *Sabally and N'Jie v A-G* [1965] 1 WLR 273, 293, per Lord Denning, MR, and 299 per Russell LJ.

¹¹⁸ Even in respect of matters which might otherwise be thought not applicable to the circumstances of the newly-settled territory, as ecclesiastical law. Thus, despite *Long v Cape Town (Bishop of)* (1863) 1 Moo PCC NS 411; 15 ER 756 and *In re Natal (Lord Bishop of)* *supra* n 117, approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-70, holding that the ecclesiastical law of England is generally inapplicable in colonies, it seems likely that the Crown possesses the prerogative power to create a Bishopric. See *R v Provost and Fellows of Eton College* (1857) 8 E & B 610; 120 ER 228.

¹¹⁹ *Campbell v Hall* (1774) 20 State Trials 239, 328-9; 98 ER 1045, per Lord Mansfield CJ. Where local laws were "barbarous or unchristian", or at any rate unsuited to settlers from civilised nations, a colony was deemed to be a settled one, even where ceded or conquered: *Advocate-General of Bengal v Ranee Surnomoye Dossee* (1863) 2 Moo PCC NS 22, 59-61; 15 ER 511.

¹²⁰ *Advocate-General of Bengal v Ranee Surnomoye Dossee* (1863) 2 Moo PCC NS 22, 59-61; 15 ER 511.

¹²¹ See the *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849.

riding sovereignty of the Imperial Parliament. This had been settled by the time of the American revolution (in which it paid no small a part), and was finally clearly stated in the Colonial Laws Validity Act 1865 (UK).¹²²

The laws which were in force in New Zealand or any other colony were only those that were applicable to the new situation and to the condition of the new colony.¹²³ It is not always easy to apply the test,¹²⁴ and it might be questioned whether the law of peerage and dignities was included, but as dignities are a form of property, it might be expected that wherever a settler goes, so does his titular dignity. Rules as to real property and conveyancing have been held to be generally applicable in colonies, both settled and conquered.¹²⁵ In fact, very few principles of the common law have been held inapplicable in New Zealand.

The New Zealand Constitution Act 1852 (UK)¹²⁶ made no special provision for titles of honour, nor did the constitutional arrangements of any other Commonwealth country. This was not however because it was felt that these were inapplicable to the colonial environment, but simply because it was a very minor aspect of the law, about which few cared, and because being a part of the royal prerogative it would have been unusual had it been included. It may be that the *Australian Pilot to Halsbury's Laws of*

¹²²28 & 29 Vict c 63. In South Australia in the late 1860's, Boothby J applied very widely the principle of the invalidity of colonial legislation repugnant to fundamental principles of English law, to the extent of finding the Constitution Act itself invalid. In part this was responsible for the passage by the Imperial Parliament of the Colonial Laws Validity Act 1865 (UK) (28 & 29 Vict c 63 s 2). The object and effect of this act was to amplify and strengthen the powers of Colonial legislatures. Because it defines power it has come to be regarded less as a source of power than as a statement of the limitations of power. This view of it is, however, erroneous. The act abolished the old theory and practice that colonial legislatures must respect the fundamental principles of English law (s 3). It provided for invalidity in cases of repugnancy to an Imperial act extending to the colony: or any order or regulation under such Acts (s 2, although this was an established rule anyway).

¹²³*Kielle v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N'Jie v A-G* [1965] 1 WLR 273.

¹²⁴*Whicker v Hume* (1858) 7 HLC 124, 161; 11 ER 50, per Lord Carnworth.

¹²⁵*Lawal v Younan* [1961] All Nigeria LR 245, 254. While the doctrine of tenure applies equally in all common law jurisdictions unless abrogated by statute, in New Zealand, s 2 of the Land Transfer Act 1952 (NZ) indicates that all the fundamental principles of land law were applicable in New Zealand where it expressly defines "land" as including: messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein, together with all paths, passages, ways, waters, watercourses, liberties, easements, and privileges thereunto appertaining, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being, unless specially excepted. The source of the rules of property law in New Zealand is the feudal legal system of England, which is also the source of all the doctrines of real property: *Veale v Brown* (1866) 1 CA 152, 157.

¹²⁶15 & 16 Vict c 72 (UK).

*England*¹²⁷ included the statement that the title "peerages and dignities"¹²⁸ has no application in Australia, but this is clearly incorrect, at least in part, as that title included knighthood as well as heraldry and peerages. Knighthood is a personal dignity which has always been fully recognised in every part of the Queen's dominions.¹²⁹

There is no evidence that peers were not recognised in New Zealand law before the acceptance of the concept of the division of the Crown. That a number of New Zealanders received peerages for services to New Zealand suggests that some legal or social recognition must have been anticipated in New Zealand.

VII. BARONETS

I now turn to the position of baronets, the starting place for Stevens' article A baronetcy, like a peerage, is an incorporeal hereditament, descendable in accordance with the grant.¹³⁰ It is a dignity title of honour, but is also, in England, land for the purposes of the Settled Land Act 1925 (UK),¹³¹ although the only place named in the patent may be located in Canada.¹³² It is submitted that the argument Stevens' proposed for denying legal recognition from peers is inapplicable for baronets, in that they are not peerages. While it may have been that peerages created in one sovereignty were not recognised in another,¹³³ baronets are not peers.

Although they do, like peerages, generally have territorial designations,¹³⁴ they are not in any sense territorially limited. In that regard at least, baronets are akin to the degree of knighthood, which is recognised throughout the Queen's realms.¹³⁵ Baronets, like

¹²⁷*Pilot to Volume 24-30* (1960) 327.

¹²⁸*Halsbury's Laws of England* (1960) vol 29 pp 239-270; now 4th ed 1994 reissue vol 35 by Susan Holmes 565-602.

¹²⁹*Calvin's Case*, *supra* n 3, 396; *Lord Advocate v Walker Trustees*, *supra* n 3.

¹³⁰*Re Rivett-Carnac's Will* (1885) 30 ChD 136. Declined to follow *Honours and Dignities, Creation of Baronets* (1612) 12 Co Rep 81; 77 ER 1359 as to whether they were fee simples rather than estate tails where no place was named in the patent. They are now accepted to be estates in tail, not fee simple conditional, and are within the scope of Statute of Westminster the Second 1285 (Eng) (De Donis Conditionalibus) (13 Edw I St I chap 2 § 3), if limited to the heirs of the body.

¹³¹15 & 16 Geo V c 18; *Law of Property Act 1925* (UK) (15 & 16 Geo V c 19) s 205 (1) (ix); formerly Settled Land Act 1882 (UK) (44 & 45 Vict c 38) s 37 (repealed).

¹³²As with Sir Stephen John Arthur, 6th Baronet of Upper Canada (UK creation 1841). Sir Stephen's father, the Hon Sir Basil Malcolm, was Speaker of the House of Representatives of New Zealand 1984-85. It was the customary use of Sir Basil's title in New Zealand which was the motivation for Stevens' article.

¹³³*Lord Advocate v Walker Trustees*, *supra* n 3.

¹³⁴These dignities, it would seem, were intended to avoid confusion when more than one baronet had the same name. Many of these places are overseas, not necessarily within the Queen's dominions, and unlike peerages, where these are found it was not thought necessary to have an additional, British, place designated.

¹³⁵*Calvin's Case*, *supra* n 3, 396 (a man was to be named as knight wheresoever he received the dignity).

peerages, are however divided into five categories: those of England, Ireland, Scotland, Great Britain, and of the United Kingdom. However, unlike peerages, baronets have no fixed unchangeable title-name.¹³⁶ All that can be transmitted to posterity are the social privileges of baronets.¹³⁷ These are the right to use the prefix "Sir" and the suffix "Baronet",¹³⁸ armorial differences and a badge,¹³⁹ and rank before all knights except the Knights of the Garter.¹⁴⁰ The wife of a baronet is also entitled to the style "Dame", although this is socially invariably rendered as "Lady".¹⁴¹ The principal distinction between a peerage and a baronetcy is that whereas the essential function of a peer is to attend Parliament, the baronet is, and always was, a purely social distinction.¹⁴²

VIII. CONCLUSION

A peer of the United Kingdom¹⁴³ is not a peer of New Zealand as such (nor does he enjoy a seat in the New Zealand Parliament), but the letters patent creating the title still entitles them to use their style in New Zealand, and elsewhere. Not only may these peers use their title, but the law of New Zealand in fact recognises them as peers. It follows that they may use their titles in legal proceedings,¹⁴⁴ have the right of access to the Queen, and to be publicly acknowledged as peers.

¹³⁶With the exception of one or two Indian baronetcies granted to Parsees, whose names are limited by special acts of the Governor-General in Council.

¹³⁷Generally, on the nature of the baronetage, see *Honours and Dignities, Creation of Baronets* (1612) 12 Co Rep 81; 77 ER 1359.

¹³⁸They cannot however be styled as baronets unless they are on the official Roll: Royal Warrant of 8 February 1910 article 2.

¹³⁹The badge is authorised by Royal Warrants of 17 November 1629 (Nova Scotia baronets), and 13 April 1929 (all others).

¹⁴⁰The letters patent creating each individual baronet sets out the privileges, rights, precedences and advantages.

¹⁴¹Thereby adding to the great deal of confusion as to whether a given woman is wife of a peer, knight or baronet, or a peeress in her own right. Of course, if "dame" were adopted, this would be indistinguishable from the style adopted in 1917 for women appointed to the two highest grades of the Most Excellent Order of the British Empire, and since used by other Orders of Chivalry (except the Most Noble Order of the Garter, which uses "Lady") as the equivalent of knight.

¹⁴²The original obligation to provide soldiers for Ireland was in no sense a qualification of the title, but merely a condition of the grant.

¹⁴³Or, of one of the other peerages, such as that of Scotland.

¹⁴⁴In general, a peer should be described by his first name and title in documents. Neither his family name nor his residence should be used. It has been held that in legal proceedings that a peer of Ireland should be described by his proper name with the addition of his title and degrees, but without the expression "commonly called", which is used by those heirs to peerages who use courtesy titles: *R v Graham* (1791) 2 Leach 547; 168 ER 376. This case, however, turned on the fact that at that time peers of Ireland were not peers of England or of Great Britain. Peers of Ireland were treated in the same way that peers of Scotland were prior to the union of 1707. It is suggested that, in light of the

It is contrary to British practice for a peerage to possess significant privileges, as was common in Europe. Certainly, what privileges they possessed were confined to the peer and his wife or widow, and never belonged to the families of the peerage. The essential difference between a peer and a commoner (and indeed, between that peer and his sons), is that the peer is a member of Parliament. *Calvin's Case* and the cases which followed it were concerned with the legal recognition allowed by the common law, of peerages conferred by another Sovereign. Peerages conferred by the British Sovereign are not, in the law of New Zealand, titles conferred by a foreign Sovereign. Rather than establishing that New Zealand law does not recognise peerage, *Calvin's Case* can be taken as evidence that the common law of New Zealand does accord legal recognition of the nobility of blood conferred by the sovereign. Thus, to cite an example relevant to our own times, Lord Cooke of Thorndon is, in New Zealand, legally entitled to the formal style and title of baron, and indeed was so styled

Union with Scotland Act 1706 (Eng) (5 Ann c 8) the decision is no longer good, and that all British and Irish peers should be styled by their first name and title in court proceedings. As the title is also one of dignity, the style of a baronet should also be used in legal proceedings: *Lapiere v Germain (Sir John) & Norfolk (Duchess of)* (1703) 2 Ld Raym 859; 92 ER 74.